Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FOREST HILLS EARLY LEARNING CENTER, INC.,
ACADEMY DAY CARE, INC., AND
HOLLOMAN CHILD CARE CENTERS, INC.,
Petitioners,

v.

LARRY D. JACKSON, AS DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COMMONWEALTH OF VIRGINIA,

and

GRACE BAPTIST CHURCH, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY BRIEF

JOHN VANDERSTAR
(Counsel of Record)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-5540

JOHN E. HEINTZ
STEPHANIE E. HUMBERT
POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
1800 M Street, N.W.
Suite 300 South
Washington, D.C. 20036
(202) 828-5300
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	4

TABLE OF AUTHORITIES

Cases: Page

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, —— U.S. ——, 107 S. Ct. 2862 (1987) 2

Pre-School Owners Association of Illinois, Inc. v. Illinois, —— U.S. ——, 108 S. Ct. 2861 (1988) .. 3

Pre-School Owners Association of Illinois, Inc. v. The Department of Children and Family Services, 119 Ill.2d 268, 518 N.E.2d 1018 (1988) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-730

FOREST HILLS EARLY LEARNING CENTER, INC.,
ACADEMY DAY CARE, INC., AND
HOLLOMAN CHILD CARE CENTERS, INC.,
Petitioners,

v.

LARRY D. JACKSON, AS DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COMMONWEALTH OF VIRGINIA,

and

GRACE BAPTIST CHURCH, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY BRIEF

ARGUMENT

We have two brief points in reply to the Respondents' opposition to the petition for certiorari.

I.

The state of Virginia and the churches acknowledge in their opposition to the petition for certiorari that the issue before this Court is clear-cut: Does a state's act in requiring a license of church-run child care centers in and of itself burden the free exercise of religion by placing the authority of the state above that of Jesus Christ, thereby immunizing an exemption from licensing from challenge under the Establishment Clause?

If the act of licensing itself does not raise significant free exercise concerns, then, in Justice O'Connor's words, there would be no "identifiable burden *on the exercise of religion* that can be said to be lifted by the government action" in order for the exemption to pass constitutional muster under the Establishment Clause. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, ——U.S. ——, 107 S. Ct. 2862, 2874-75 (1987) (O'Connor, J., concurring) (emphasis in original).[1]

The resolution of this issue will have far-reaching implications. For example, as part of its ministry, a church may be involved in the transportation of parishioners to and from worship service. Should a church now be able to obtain an exemption from licensing church bus drivers because it believes that licensing places the state above the Lordship of Jesus Christ?

---

[1] Although Respondents argue that their free exercise rights might be burdened by the application of standards concerning such areas as program content, see Respondents' Brief at 6, there is no evidence that the state ever denied or revoked a license of any center based on such standards, much less that the state has affected the religious nature or content of the program. Constitutional questions should not be decided on hypothetical concerns about the possibility that the state might act in an unconstitutional fashion at some time.

II.

This Court has never addressed the issue of whether the act of licensing an operation of a church said to be part of its ministry, by itself, burdens the free exercise of religion. The churches and state suggest that this issue was addressed in *Pre-School Owners Association of Illinois, Inc. v. Illinois*, —— U.S. ——, 108 S. Ct. 2861 (1988), where this Court dismissed an appeal for want of a federal question. That is incorrect. In *Pre-School Owners*, the exemption was not based solely on religion. The exempt religious child care centers were part of a larger group of centers that were exempted because they were operated as part of an elementary school and were subject to the authority of the State Board of Education. The Illinois Supreme Court upheld the exemption based on the ability of the state to choose one regime of regulation above another. The exemption statute, unlike the Virginia exemption at issue here, did not single out religious organizations for preferential treatment and did not exempt such centers from most regulations. *Pre-School Owners Association of Illinois, Inc. v. The Department of Children and Family Services*, 119 Ill.2d 268, 518 N.E.2d 1018 (1988). Thus, the Court has not addressed the issue of whether the act of licensing sufficiently burdens the churches' free exercise rights so as to support an exemption from generally applicable health, safety and welfare standards under the Establishment Clause.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, Petitioners respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN VANDERSTAR
(Counsel of Record)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-5540

JOHN E. HEINTZ
STEPHANIE E. HUMBERT
POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
1800 M Street, N.W.
Suite 300 South
Washington, D.C. 20036
(202) 828-5300
Counsel for Petitioners